cents. Befo[illegible]e could give the type of information, of advise, he was discussing before, it would involve more detailed records. Where those records are given to credit men in the shoe industry, then such advice is available from them. He can definitely say that of Brown, whether the dealer is a franchise or not, he can still secure that type of service, that type of counseling from his regular credit man. They are qualified to give it to him. He is confident that other shoe firms credit men are also qualified to do that. And they do give it to the best of his knowledge.

Recross-examination.

The witness was asked what he would think of a statement by a division manager of a shoe company, that in the industry some manufacturers give credit terms more favorable to some of their customers than those generally given to all of their customers, such as larger discounts and extended dating. The witness can only answer from his own experience with the company. Brown does not do that. As to the industry he could not answer. He doesn't know whether they do or not. From all his sources of information they do not.

[fol. 701] Further Redirect examination.

As to whether he would be likely to know if they did the witness said the chances are you would not know. They would not tell you if they were deviating.

Counsel for the Commission asked whether the division managers of a shoe company would know that, or whether he would have any access to information that the witness didn't know. The witness said he may have. If he is in on the sale at the time, why, he probably would know what the arrangements would be as well as the credit man. If some other company were making the sale he wouldn't be in on the arrangement if it were a different company.

J. Richard Johnston, called as a witness for the Respondent, testified further as follows:

Direct examination.

He is the same Mr. Johnston that previously testified in this proceeding. He occupies the same position with the Respondent now as he did at the time of the previous testimony.

He has, under his direction and supervision, made a survey of outside lines of shoes carried by stores of the Brown franchise program. The survey was made in the form of a bulletin or a memorandum first, that was mailed out to all of the Brown franchise dealers, requesting that they send Brown a list of all of their footwear and rubber, canvas and slipper resources. And the dealers responded, many of them, by providing Brown with the information requested, by listing the brands of footwear that they carried in their store.

At this time a three volume exhibit was marked as Respondent's Exhibits 11, 12 and 13 for identification. The exhibits were shown to the witness. These volumes constitute the documents relating to this outside line survey that he conducted among the Brown franchise stores. In the forepart of Volume 1 of this survey, marked as Respond- [fol. 702] ent's Exhibit 11, there is an explanation of the survey and the results of the survey tabulated in the manner indicated, together with a list of conflicting lines carried by the stores, as surveyed and reported by those stores.

If the witness were asked questions to develop the information set out in those explanatory sheets and summary of this survey he would testify the same as set out in those summary sheets and analysis of the survey. It states in the summary when the letter was sent out. The date of the letter is November 30, 1960. It was mailed to all franchise stores on the program at that time. Replies were received from 573 franchise stores in number. Of the 721 stores then operating on the program that is approximately 80 percent return. There was no follow-up to the person in trying to get the information. At the top of the form letter just referred to it says "Independent Retailers Division." That is the same as the Brown franchise program. At this time Respondent's Exhibits 11, 12 and 13 were offered in evidence.

Voir Dire examination.

By Mr. Timony:

Q. Mr. Johnston, determining the results of this survey, you used the term "conflicting lines." Did you determine the definition of that term in going through these?

A. Yes, I did, sir.

Q. What did you use in so defining that term?

A. I formed my decision based on my experience and knowledge of the industry and my familiarity with the lines that were listed as to whether or not they were conflicting with Brown Shoe Company lines. Perhaps some in a broad sense and some in a minor sense. By that I mean that some were broad conflicting lines and some were short conflicting lines.

Q. And what do you mean by short conflicting lines?

A. Well, a line that might be confined to a small segment of the shoe business, we might use Clinic. Clinic is a short line of ladies' professional and duty shoes. And they are confined strictly to that type of footwear and the line is very [fol. 703] short. I believe the line in total only amounts to about eight or ten patterns and that is an example of what I would interpret as a short line.

Q. And if the independent retailer on your independent retailers division plan wrote to you and named that line, then you would, you put it in the results of your survey?

A. That is correct.

Q. And isn't it a possibility that that dealer just might have a few patterns of that particular brand shown in the results of the survey as a conflicting line?

A. It is very possible. Of course, the line, as I mentioned, consists only of a few patterns. He might——

Q. In that case—pardon me——

A. (continuing) —He might be carrying three or four of those patterns and he might be carrying six or seven or eight of that pattern.

Q. And in that line or in other lines he might be carrying just a few patterns and still be listed in the results of your survey as a conflicting line?

A. That is right.

Q. Did you, in making your definition of the term "con-

flicting line," refer to Commission's Exhibit 84, which is a list sent with a letter from Mr. Griffith which we put into evidence containing the conflicting lines and referring to a Brown line to which they conflict?

A. No, I did not refer to any list when I decided whether or not a line was conflicting as I reviewed this, the results of the survey.

Hearing Examiner Creel: The information you received did not show the patterns that these retailers were handling, did it?

The Witness: No, sir.

Hearing Examiner Creel: I am trying to determine if a line does conflict in some respects with one of the Brown lines, but in other respects does not conflict. In other words, some patterns do not conflict with the Brown patterns but if the reporting retailer showed that he carried any of this line would you consider that as a conflicting line and so record it?

[fol. 704] The Witness: Yes, I would.

Hearing Examiner Creel: All right.

By Mr. Timony:

Q. Did you use price as one of the criteria in determining what a conflicting line is?

A. You mean the suggested retail price of what we assumed those lines retailed for in the industry?

Q. Well, yes.

A. Yes.

Q. In other words, you wouldn't list I. Miller as a conflicting line with Brown, would you?

A. No.

Q. Or you wouldn't use a very cheap shoe, what is a cheap brand of shoes; by cheap I mean very inexpensive women's shoes?

A. Well, most, practically all cheap brands of ladies' shoes are either under a jobber's brand name or under a brand that is not nationally advertised.

Q. Did you just use nationally advertised brands in determining the results of your survey as to conflicting lines?

A. No, there are some nonnationally advertised lines in there. I think for example, P-i-e-r-r-e, I believe is the cor-

rect spelling, that is a jobber's line and I do not believe it is nationally advertised. But that would be a low-priced ladies' line that would conflict with Brown Shoe, one of Brown Shoe Company's lower priced line of ladies' shoes.

* * * * * * *

At this time Respondent's Exhibits 11, 12 and 13 were received in evidence over the objection of Counsel for the Commission.

If there is an overlap in price at the top of an outside line and the bottom of a Brown line, the witness would still consider these to be conflicting lines. The same thing would be true for classification on the other end of the scale, which is the bottom of a higher priced line and the top of a Brown line. In other words they are degrees of conflict. As an explanation of what he just said, Florscheim would not be considered a conflicting line as listed in this document. The reason is simply because at the top of Brown's sug- [fol. 705] gested retail of Roblee line it conflicts with the bottom suggested retail price of Florsheim, however, the bottom segments that he mentioned of each line are comparatively small as to that area of conflict. However, some lines that are listed here are in total conflict with Brown Shoe Company suggested retail price.

What the witness is saying then is the extent that he used in your judgment was the extent of the conflict. And as to those lines which in his judgment were parallel as to price, pattern, and the other elements that he previously testified to, he used that criteria as to what constituted a conflicting line.

The Hearing Examiner said there was another thing that troubles him in making use of this survey, and that is, suppose a given dealer shows that he carries a man's shoes that would conflict with Roblee, both price and otherwise, you would say, is there anything to show that this particular dealer handles Roblee. The witness replied, in other words, it might conflict with the Brown line very definitely but not conflict with the Brown line that that particular dealer handles. So is there anything in here that would show us whether or not it conflicts with the line that he does handle. The Hearing Examiner said he didn't think that the record

shows that every franchise dealer handles Roblee line. The witness is not sure that it shows that in the record.

The witness recalls that there was previously introduced in evidence as Commission's Exhibit 141, a schedule showing stores on the Brown franchise program that were on the program as of January 1, 1960, and joined the program after January 1, 1955. One of the dates, relating to Gryder in Biloxi, Mississippi, on page "K" of this exhibit was in error. The witness has checked what the records show as to the correct date. The correct date would be May 11, 1955. By agreement with Counsel for the Complaint the date shown for Gryder shoes in Biloxi, Mississippi, on page "K" of Commission's Exhibit 141, is changed to May 11, 1955.

Counsel for respondent made a statement that there were a number of stores mentioned at various times by witnesses [fol. 706] who testified, principally manufacturer witnesses, regarding various franchise stores and the dates when those stores went on the program, which is not otherwise shown on other exhibits. It becomes pertinent and he has asked Mr. Johnston to prepare such a list from the books and records of his division to indicate the dates that these particular stores first went on the program. This is the purpose of an exhibit which he now asks to have marked for identification as Respondent's Exhibit 14-A and B.

Respondent's Exhibit 14-A and B for identification was shown to the witness. That shows a name of a franchise store listed there, its location and the date when that particular store first went on the Brown franchise program. This was taken from the records of the witness' department. It was prepared under his direction and supervision. Respondent's Exhibit 14-A and B was offered and received into evidence without objection.

The witness said there is no Brown franchise store in High Point, North Carolina. There never was one there. The witness bases that on his knowledge of the store program in the records of his division. In reference to Brunswick, Georgia, there is no store located there which is on the franchise program. There never was a store in Brunswick, Georgia, on the franchise program. The witness has heard the name Quality Shoe Store in Brunswick, Georgia, mentioned by others, but he does not know if that store

does exist. That store is not on the Brown franchise program according to his records and his knowledge.

F. Litt in Philadelphia is not a Brown franchise store. It is a huge department store in Philadelphia, Pennsylvania. Rich's is another huge department store, in Atlanta, Georgia and enjoys the reputation of being the largest department store in southeast United States. It is not on the Brown franchise program, nor was it ever. And Litt Brothers was never on the Brown franchise program. The witness is not acquainted with a shoe store referred to as Randy's in Chisholm, Minnesota. If there was such a store, it is not on the Brown franchise program. The witness would know if it was on the Brown franchise program. [fol. 707] There was never a store of that name at that location on the Brown franchise program according to his records and knowledge.

Brown franchise stores do not receive special merchandise from Brown Shoe Company. They are not treated in any way different from any regular accounts as far as merchandise of Brown Shoe Company. There is no difference from the standpoint of receiving special merchandise. Brown does not take markdowns on merchandise from Brown franchise stores in any way.

The furnishing of signs to a retail shoe store which may be on the Brown franchise program is not related to the Brown franchise program in any way. That is handled solely through the sales division and if a dealer, whether he is a franchise dealer or a non-franchise dealer, gets a sign from the company for the exterior of his store, that is a decision that is made between the salesman in the territory and perhaps the sales manager. But whether or not the store is on the program has no bearing whatsoever as to whether the store received an exterior sign. In other words, it is just a matter of customer relationship between the store and the salesman. Signs under this arrangement are sometimes provided to franchise and sometimes to non-franchise stores, but it is not a part of the franchise program.

The witness has conducted a survey of shoe outlets in various towns and cities of 5,000 to 30,000 population in which a Brown franchise store is located. This survey was conducted under his direction and supervision. The survey

was conducted through the field staff of his division. When he talks about "field staff" he is referring to what have been called "fieldmen." In making the survey, their fieldmen were requested to make the survey just referred to, in towns of their territory between 5,000 and 30,000 population, as to the number of stores in those towns that sold shoes.

At this time Respondent's Exhibit No. 15 was marked for identification and then shown to the witness. The second page of the exhibit is the form of information request that the witness addressed to the fieldmen in initiating [fol. 708] the survey. The letter is dated November 28, 1960. Information contained in the survey was developed by the responses he received from the fieldmen pursuant to this request. The page that is set out in the first page of this exhibit as an explanation of this exhibit was prepared under his direction and supervision. If he were asked the questions that would elicit the information there set out, his testimony would be as set out in this explanation. The report contains 128 reports. Those would relate to the cities in this population group where a franchise store was located. Respondent's Exhibit No. 15 was offered in evidence.

Hearing Examiner Creel: I take it these field men that made this survey determined for themselves whether the towns fell in this population range of 5,000 or 30,000?

The Witness: No, they checked with either the local Census Bureau or from the current population census that they made available to them in their area.

Hearing Examiner Creel: Well, it would be the 1950 census, wouldn't it?

The Witness: That is right; that is correct.

By Mr. Burke:

Q. I might ask Mr. Johnston if those cities that are referred to in that population group were related and shown on this exhibit, are related to the 1960 census inasmuch as that is information that became available after that survey?

A. I was in error. That is a result of the report of the 1960 population census.

Q. But the figures on those sheets, I mean the group of towns or cities shown in Respondent's Exhibit 15, having been designated as falling within the population group of

5,000 to 30,000 are related and have been examined in connection with the 1960 census figures?

A. Yes, sir.

Hearing Examiner Creel: Well, for instance, I am looking at one, it is page 8; it looks like it is dated December 15, 1960, and there is a population figure given him that couldn't be from the 1960 census.

[fol. 709] Mr. Burke: Perhaps you misunderstand. At the time that that figure was put down that would not be true. But as to compiling them in relation to the 1960 census which became available later during 1960, in 1961, we used the 1960 census figures in grouping these documents that are contained in Respondent's Exhibit 15.

Hearing Examiner Creel: I see.

Mr. Burke: There is a companion exhibit that has already been received in evidence, Respondent's Exhibit 6, which lists the Brown Franchise Stores by states and by population groups, which are the same, where the city that is referred to in Respondent's Exhibit 15 would be coded to the population group of which a franchise store is shown on Respondent's Exhibit 6.

The Witness: This is right.

Mr. Burke: Here is the population grouping we prepared for all franchise stores, as to how they fall. (Showing to Hearing Examiner.)

Hearing Examiner Creel: Do you want to mark that?

Mr. Burke: This is in evidence as Respondent's Exhibit 6. I would offer into evidence Respondent's Exhibit 15.

Hearing Examiner Creel: Is Respondent's Exhibit 15, 100% complete?

Mr. Burke: No, sir. May I state this, that this is a survey, contains 128 reports from fieldmen; as shown in Respondent's Exhibit 6, based on population groupings, there are a total of 290 franchise stores not in metropolitan areas as defined by the Bureau of Census, but are located in towns and cities in the population group of 5,000 to 30,000. This report, therefore, this Exhibit 15, therefore contains 128 reports as to 128 towns or cities within that population range or about 45 percent of the total number of stores that would be within that population range and we feel that it is——

[fol. 710] Hearing Examiner Creel: Well, I am not suggesting that it should be larger; I just wanted to know what the facts were.

After discussion between Counsel for the Commission, Counsel for respondent and the Hearing Examiner, Respondent's Exhibit 15 was received in evidence.

Cross-examination.

The witness was shown Respondent's Exhibit 15, and the third page thereof. He was asked if when he stated in his survey form that retail prices are not important, he meant to show to the fieldman that the stores which he would find in the survey might sell shoes that don't in fact conflict with Brown. The witness answered, no. His purpose in putting that statement in was for the fieldman to be sure to check every store in the town involved that he was checking that sold shoes, regardless of price. Any store that sold shoes, including department store, variety store, ten-cent store, drug store, shoe repair store or grocery store.

The witness is familiar with the term five-and-ten-cent stores. To his knowledge Brown does not sell shoes to five-and-ten-cent-stores. He is familiar with the term shoe repair shops. Brown does sell to a shoe repair shop that he knows of. It is Burkhart Smeyers at Fairbolt, Minnesota. That shoe shop is a shoe repair shop in connection with a shoe store, but there are shoes sold in both the shoe store and the shoe repair shop. He does have a shoe store and he sells shoes within the shoe repair shop also. As to whether there are other shoe repair shops that Brown sells, the witness said the one that he mentioned comes to his mind immediately. He knows there are others but right at the moment he cannot specifically name them. Brown does not do this as a general practice.

Brown does not sell to drug stores as a general practice. It has sold to drug stores. Brown sells to men's clothing stores very often. Brown does not sell to hardware stores to his knowledge, unless the hardware store might by chance be a part of a department store that would sell shoes and [fol. 711] the store would go under the name of it, or the name hardware would be incorporated in the store's name. Brown does sell to sporting goods stores. It does a good

deal of business through sporting goods stores. He does not know the percentage of business that it does through sporting goods stores.

If Brown had a choice in a town of 5,000 to 30,000 of selling to a family shoe store or to a sporting goods store, as to which one it would take, the witness said in his opinion that would vary. If it is a sporting goods store, Brown's men's division might prefer to sell the sporting goods store than the family shoe store, if they saw potential for their line being greater in the sporting goods store than they did in the family shoe store. It would depend on volume. That is his purpose in wording his answer the way he did. The salesman might elect to sell the family shoe store feeling that the family shoe store would do a better job with his shoes, or he might elect to sell the sporting goods store, depending on whether he thought the sporting goods store might do a better job with his line. There is no policy in Brown which would preclude a salesman of men's shoes, say Roblee, from selling to the sporting goods store if the family shoe store wanted them in his store, and if Brown was selling to both the family shoe store and the sporting goods store.

Brown doesn't sell the same line of shoes in a town of 5,000 to two different stores as a nationwide procedure, but it does in many instances. One of Brown's divisions sells some shoes to some surplus stores. The witness is familiar with the term specialty store. Brown sells to specialty stores.

The witness does not consider that all branded shoes compete with Brown lines regardless of the retail price at which those shoes are sold. Some salesmen feel that all shoes, all branded shoes are competitive to their brand if it is the same gender.

It is possible that some of those stores in Respondent's Exhibit 15 are on a franchise program of another company. It is possible that some of those stores are owned by manu- [fol. 712] facturers of other shoes. It is possible that some of them are chain retail stores.

Department stores often buy shoes on what is called a make-up basis. To explain the term "make-up," the witness said shoes being bought on a make-up basis are shoes that are bought by a retailer from a manufacturer that are made up for him specifically. In other words, a retailer might decide to buy 72 pair of one pattern in black suede and that

shoe may not be what is considered in the industry a stock shoe that the manufacturer carries in stock, that he can supply dealers periodically, from week to week and from month to month. And if that shoe is not carried in stock, on the basis that he has just mentioned, it would be considered a make-up shoe and those 72 pair of shoes would be made for the retailer specifically.

It is possible that some of the department stores listed in Respondent's Exhibit 15 buy shoes on a make-up basis the same as many family shoe stores buy shoes on a make-up basis and all types of shoe retail establishments very often buy shoes on a make-up basis.

Brown does not sell shoes to any grocery stores that he knows of.

The witness is not familiar with how many outdoor signs Brown either gave, rented or sold to retailers last year. Any sign program that any Brown division may have is handled by the sales division individually and is not handled through the franchise store division. As to whether many Brown franchise dealers receive signs from Brown because of their high volume of purchases from Brown, the witness said, not for that reason, no, sir. Not simply because they might be a totally high volume customer from Brown Shoe Company. They might be a high volume customer for a specific line of Brown Shoe Company shoes and as a result of that the salesman that sells that line at the time at that store might decide to provide that store with a sign for his division. But if he gets a sign it is not because he might be a totally good customer of Brown Shoe Company. That is not so.

Mr. Astroth's testimony, that the average volume of sales by Brown franchisees was approximately 90,000, is a little [fol. 713] low. He think it is approximately $97,000. They got that information from a computation of calendar year sales from the stores as a group who provided Brown with that information, and they struck an average from the group of stores reporting their total calendar year figures to them. That is not an actual figure, it is an approximate figure. He doesn't know whether it would be more than the average for a family shoe store in volume or not because he has never made a study of the average annual volume of the average family shoe store.

Q. You say that the stores in your Brown Franchise Program are choice retail outlets or do you try to get choice retail store outlets in your Brown Franchise Stores?

A. Yes, sir. We do.

Q. And are they?

A. Yes, we think they are choice.

Q. They are usually established responsible distributors?

A. Well, not in all instances, no, because an individual may decide, may be deciding to go into the business as a first retail shoe business venture.

Q. But even these ones that go into a venture you sort and pick and make sure that they are the best market available for your Brown Franchise Store, isn't that a fact?

A. Well, no. No, it is not, because an individual may come to us and, being interested in going into the shoe business in his community and if we can mutually decide together that what he is asking or seeking—when I say "mutually decide," he actually makes the decision but as we counsel with him and advise him regarding his interest, and if he elects to go into the shoe business in the area that he decides upon, as a result of the counsel with us, why we try to be of help to him. We don't try to get the information from him and then go and seek out someone who might be better than he. And I think that is what you had in mind, is it not, sir?

Q. No, I was just trying to find out, and I think it is a fact that you do try to get the best retail outlet in any city that you can to be your Brown franchisee. If you have your choice, you certainly get the best store that you think will be a good choice retail outlet.

A. We hope that it will be that way but we do not always [fol. 714] have our choice, because I cannot say in all instances our Brown Franchise dealer is the number one store in his particular community.

Not all of the stores on the Brown franchise program specialize in selling shoes, meaning they are shoe stores as different from some of the stores listed or shown in Respondent's Exhibit 15. They have some dealers who operate a leased department in a department or a specialty store. These dealers would individually specialize but the store they operate in may not be a total shoe store. There are a few independent retailers on the program who specialize

in the sale of some other products other than shoes, such as stores who have some ladies ready-to-wear and ladies sportswear and possibly some small amount of men's furnishings that they sell in that store in conjunction with their shoe business. There are approximately a half a dozen of those stores on the Brown franchise program. It is very very small. The majority of them do specialize in the sale of shoes.

The name of the present franchise program is the Independent Retailers Division. He thinks that at the last count there were 766 or 767 stores on the program. He doesn't know. It changes from week to week.

* * * * * * *

[fols. 715-716] Redirect examination.

Brown Shoe Company does sell to retail chains.

Mr. Burke: Your Honor, that concludes the respondent's presentation.

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[fol. 717] IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,336.

BROWN SHOE COMPANY, INC., Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent.

Petition to Review Order of Federal Trade Commission

Before VOGEL, MATTHES and RIDGE, Circuit Judges.

OPINION—December 8, 1964.

VOGEL, Circuit Judge.

This case arises from a petition to review an order of the Federal Trade Commission directed against Brown Shoe Company, Inc. The case was originally brought by the Commission under §5 of the Federal Trade Commission Act which provides:

> "§5(a)(1). Unfair methods of competition in commerce, and unfair and deceptive acts or practices in commerce, are declared unlawful." 66 Stat. 632 (1952), 15 U.S.C.A. § 45 (a) (1) (1958).

[fol. 718] The Commission's complaint, issued October 13, 1959, alleged that Brown Shoe Company, Inc., a manufacturer and distributor of shoes, violated § 5 through the operation of its franchise stores program and by fixing the retail prices at which its products were sold by dealers.

Count 1 alleged that Brown "entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which required said customers to restrict their purchases of shoes for resale to the Brown lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of Brown". It charged that dealers having this relationship with Brown are termed "Brown Franchise Stores" and are afforded special treatment and given certain benefits not granted other customers.

Among the benefits or services listed in the Commission's

complaint were "free signs, business forms and accounting assistance participation in lower cost group fire, public liability, robbery, and life insurance policies; and special, below list prices on U. S. Rubber Company canvas and waterproof footwear". In return for these services, the complaint charged that franchise dealers must "concentrate" their purchases of shoes upon "the grades and price lines" of shoes manufactured and sold by Brown. It further charged that such dealers must "refrain from stocking and selling shoes of competitors" and that dealers who violate their franchise agreement by doing so are dropped from the program and are deprived of the benefits available thereunder.

The Commission alleged that the "purpose, intent or effect" of such practices on the part of Brown was "substantially to lessen, hinder, restrain and suppress compe- [fol. 719] tition" in the distribution of shoes in interstate commerce and in general to "foreclose" or "exclude" competitors from a "substantial share" of the retail dealer market, thereby further enhancing the already powerful competitive position of Brown in the shoe industry.

Count 2 of the Commission's complaint charged petitioner with resale price fixing in forcing or requiring its retail dealers to "agree to maintain arbitrary, non-competitive resale consumer prices fixed and promulgated by Brown".

In connection with Count 2, the complaint alleged that petitioner "regularly publishes and distributes" to its customers "price lists or catalog lists" containing "the consumer prices to be observed" by them and that petitioner "frequently publishes" these prices in "full page advertisements in magazines having national circulation".

The complaint charged that through its representatives and officials Brown "maintains continuous pressure" upon its dealers "to insure that they do not depart from or sell below the minimum retail prices" established. It charged that non-adherents to these prices "are immediately contacted by Brown representatives" to insure compliance by "persuasion" if possible but "if that fails, to threaten and inform" such dealers that petitioner "will discontinue doing business" with them.

The acts and practices of petitioner set forth in both counts of the complaint were alleged to constitute unfair

methods of competition and unfair acts and practices in commerce within the intent and meaning of § 5 of the Federal Trade Commission Act.

Brown, through its answer, generally denied the charges in the complaint. With reference to Count 1, however, [fol. 720] Brown admitted entering into "contracts or franchises" with approximately 259 retail dealers. In addition, it declared that there were approximately 423 dealers operating on a "Brown Franchise Program" who had not executed such written agreements.

The franchise agreement in question admittedly contained a provision stating that in return for the services and benefits described, the franchise dealers must "concentrate" their business upon products manufactured by Brown. Brown admitted that the operators of such Brown franchise stores "in individually varying degrees" accepted benefits and performed the obligations contained in such franchise agreements implicit in such program. It further admitted that in general the enumerated services and benefits are not available to those dealers "who are dropped or voluntarily withdraw" from the program.

In answer to Count 2, petitioner admitted only that it "regularly distributes to its retail shoe customers price lists or catalog sheets, certain of which contain suggested retail selling prices" and that "on occasions it publishes suggested retail selling prices in full page advertisements in magazines having national circulation".

Following extensive hearings in St. Louis, Missouri; Milwaukee, Wisconsin; Dallas, Texas; Washington, D. C.; Los Angeles and San Francisco, California; and Portland, Oregon, the Hearing Examiner issued an initial decision in which he found that the charges set forth in both counts of the complaint were sustained by the evidence, and entered an order requiring Brown to cease and desist from these practices. Brown took exception to the Examiner's findings and petitioned the Commission for a review. Its petition was granted. After hearing the matter on briefs [fol. 721] and oral arguments, the Commission modified a portion of the Examiner's decision to conform to its own views. As thus modified and as supplemented by its own opinion, the initial decision of the Hearing Examiner was adopted.

In modifying the initial decision, the Commission deleted therefrom the Examiner's findings as to the substantial effect of the Brown franchise program on competition and substitute therefor its own findings. It held that it was not necessary to examine the probable effect of petitioner's program upon competition in order to find that the program was an unfair trade practice violative of § 5 of the Federal Trade Commission Act, but that in any event, on the authority of *Brown Shoe Co. Inc.* v. *United States*, 1962, 370 U.S. 294,[1] the prospective competitive impact of the program was such as to render it unlawful. The Commission stated:

> "We have found that Brown's operation of the franchise plan constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission

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[1] Therein the United States brought suit to enjoin consummation of a merger of two corporations (Brown Shoe Company, Inc., the petitioner herein, and the G. R. Kinney Company, Inc., eighth largest retailer of shoes) on the ground that its effect might be to substantially lessen competition or tend to create a monopoly in the production, distribution and sale of shoes in violation of § 7 of the Clayton Act, as amended 1950. The District Court had found that the merger would increase concentration in the shoe industry, both in manufacturing and retailing, eliminate one of the corporations as a substantial competitor in the retail field, and establish a manufacturer-retailer relationship which would deprive all but the top firms in the industry of a fair opportunity to compete and that therefore it probably would result in a fairly substantial lessening of competition and an increased tendency toward monopoly. In affirming the District Court, the Supreme Court said at page 346 of 370 U.S.:

> "We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time. In the light of the trends in this industry we agree with the Government and the court below that this is an appropriate place at which to call a halt."

Act. We conclude, therefore, that Count 1 of the complaint has been sustained. Moreover, an examination [fol. 722] of the market facts of the shoe industry, as developed in this record in the light of the Brown Shoe decision, persuades us that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act, as amended, have been met."

On May 1, 1963, Brown filed its petition to review the order of the Commission on the grounds that such order and the findings and opinion upon which it was based are arbitrary and capricious, not supported by any substantial evidence, not in accordance with law, and lacking in due process. Petitioner has asked to have the order set aside and the complaint dismissed. The findings of the Commission and the Examiner may be summarized as follows:

Petitioner, Brown Shoe Company, Inc., is a New York corporation with its office and principal place of business in St. Louis County, Missouri. It is primarily engaged in the manufacture and distribution of nationally advertised medium-priced men's, women's and children's shoes. Brown and its subsidiaries operate over 50 manufacturing, supply and service plants located throughout the United States and Canada. In 1959, this complex ranked third in shoe pairage production among the country's approximately 900 to 1,000 shoe manufacturers. These manufacturers produced 632 million pairs of leather shoes in 1959.

The shoes manufactured by Brown and its subsidiaries are marketed on a nation-wide basis, primarily through sales at wholesale to independent retail customers, including individual shoe stores, chain stores, department stores and specialty stores. Apart from its subsidiaries, Brown was selling to approximately 6,000 retail customers at the time the complaint was issued.

[fol. 723] Brown was second in dollar sales and third in pairage production in the shoe industry in 1958 and 1959.[2]

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[2] This included the dollar sales and pairage production of G. R. Kinney Corporation, at that time a wholly-owned subsidiary of Brown operated as a separate business by court order. Brown has since divested itself of Kinney, pursuant

Although total dollar sales for the fiscal year ending October 31, 1959, were $276,549,164,[3] this figure included sales at wholesale and at retail by Brown and its subsidiaries and included inter-company sales as well. Brown's sales at wholesale for the same period to its 6,000 independent retail shoe store customers were $111,292,872. That same year (1959) the top 70 shoe manufacturing firms in the industry had total dollar sales of 1.8 billion dollars.

Brown maintains an extensive distribution system. It is organized into separate selling divisions through which it markets its various brands of shoes to its retail customers.

The division of Brown which is of paramount importance under Count 1 of the complaint is the franchise stores division. The personnel of this division include a manager, two assistants and 16 salaried "field men" who travel in assigned territories servicing various franchise accounts. The franchise division manager is responsible to the vice president in charge of sales.

Petitioner's franchise stores program has been in operation for approximately 30 years. More recently the number of dealers under this program has increased. In [fol. 724] November 1959 there were 682 retailers in the system. By October 1961, at the conclusion of reception of evidence herein, the number of franchises had increased to about 767.

Petitioner makes no distinction between dealers having

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to court order. In 1957 Kinney's net sales while a subsidiary of Brown were $62,000,000. If Kinney's sales (and any reasonable pairage production estimate) are subtracted from the figures shown for the top seventy shoe manufacturers, Brown would be third in dollar sales and fourth in pairage produced for the 1958 and 1959. *Brown Shoe,* supra.

[3] Includes sales by G. R. Kinney Corporation. Kinney was formerly an independently operated company. At the time of the hearings it was a wholly-owned subsidiary of Brown. Subsequently, petitioner's merger with this company was declared illegal under § 7 of the Clayton Act, the anti-merger provision, 64 Stat. 1125 (1950), 15 U.S.C.A. § 18 (1958), and petitioner was ordered to divest itself of Kinney. *Brown Shoe,* supra.

written franchise agreements with it and those who do not insofar as any benefits or obligations under the program are concerned. In November 1957 petitioner had written franchise agreements with approximately 260 dealers.

The Brown franchise agreement requires that the retail dealer—*in return* for various enumerated services and benefits—must:

> "* * * concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company."

Several valuable benefits and services are afforded franchise holders. Specifically mentioned in the franchise agreement are: The services of field representatives; the use of merchandising forms and records; retail sales training programs; accounting system installation; group purchasing of insurance, rubber footwear and display materials; and the opportunity to participate in national and regional sales meetings.

The Commission found that the "prime motivation" of dealers in joining and continuing on the franchise program was the above-described benefits and services available to them. The Commission recognized that not every dealer utilized each benefit, but found that "collectively" these benefits achieved the intended effect; viz., attracting selected retailers to the program and inducing them to comply with its restrictive requirements.

[fol. 725] The Commission found that these requirements as set forth in the franchise agreement were applicable to "signer and non-signer franchise holders alike"; that this agreement not only "on its face" restricted competitive purchasing of franchise dealers, but that petitioner's field men actively policed dealers to insure their concentration upon Brown lines and elimination of competing products; that franchise dealers who persisted in carrying conflicting lines were separated from the program.

The Commission found that although franchise dealers theoretically may be free to quit the program and return to their former status, the record on the whole showed that the relationship between Brown and its franchise dealers

was "reasonably stable". The Commission likewise took into account evidence showing that franchise dealers sometimes handled certain types and quantities of competitive shoes. It held that such evidence did not vitiate its finding that competitors were foreclosed from selling to franchise dealers in substantial amounts and that other evidence of record established this. (The record indicates that Brown franchise dealers purchase approximately 25% of their shoes from other manufacturers. A part of this 25% was made up of lines in competition with Brown.)

In sum, the Commission held that petitioner's operation of its franchise program, which it found effectively foreclosed competitors from making substantial sales to a significant number of desirable retail outlets, constituted an unfair trade practice in violation of § 5 of the Federal Trade Commission Act. The Commission further found that petitioner's practice of conditioning the above-described benefits of membership in the program upon adherence to the restrictive terms of the franchise agreement [fol. 726] was "akin to the operation of tying clauses generally held as inherently anti-competitive". In addition, the Commission, after examining the various economic factors in the shoe industry, was persuaded "* * * that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act, as amended, have been met."

As to Count 2 of the complaint, the Commission found that petitioner entered into agreements with its retail dealers that its suggested retail prices would be followed and that it attempted to enforce and had in fact effectuated compliance with such agreements. The Commission found that Brown communicates the prices it establishes in "various ways". Most of Brown's selling divisions furnish their salesmen and customers with price lists containing a retail price "suggested" by petitioner. The Commission further found that advertising is another method used by petitioner to establish retail prices. On the whole, the Commission's evidence relating to Count 2 of the complaint concerns transactions with two of Brown's franchise stores and their pricing policies.

When this case was first instituted on October 13, 1959, it obviously was the theory of the Federal Trade Commis-

sion that Brown's franchise stores program was an unlawful exclusive dealing arrangement violative of § 5 of the Act. It was so found by the Hearing Examiner and decided by him on that basis. The Commission struck such findings of the Examiner, stating:

> "In short, from our review of the record, we find that respondent's operation of the franchise plan, which has effectively foreclosed its competitors from selling to a significant number of retail shoe stores, constitutes an unfair trade practice under Section 5 of [fol. 727] the Federal Trade Commission Act. Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anti-competitive."

A proceeding under § 5 of the Federal Trade Commission Act is not one brought before the Commission by one party against another. It is instituted by the Commission itself and may be commenced whenever the Commission has reason to believe that "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce * * *" have been used by the party against whom it proceeds.

> "* * * The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'. 'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.' *Federal Trade Comm. v. Sinclair Co.,* 261 U.S. 463, 476. All three statutes [the Sherman Anti-Trust Act, the Clayton Act and the Federal Trade Commission Act] seek to protect the public from abuses arising in the course of competitive interstate and foreign trade." *Federal Trade Commission* v. *Raladam Co.,* 1931, 283 U.S. 643, 647, 51 S.Ct. 587, 75 L.Ed. 1324.

Our primary question is whether there was adequate evi-

dentiary basis for the Commission's finding that the Brown franchise program was an unfair method of competition and accordingly unlawful under § 5 of the Act. The Act itself provides, 15 U.S.C.A. § 45 (c) "* * * the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The use of identical language with [fol. 728] reference to the findings of the National Labor Relations Board under the Wagner Act caused the Supreme Court to say *Universal Camera Corp.* v. *N. L. R.* B., 1951, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456:

> "* * * The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. * * *
>
> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

With reference to what is "unfair" within the purview of § 5 of the Act, the Supreme Court has said in *Federal Trade Commission* v. *Gratz*, 1920, 253 U. S. 421, 427, 40 S.Ct. 572, 64 L.Ed. 993:

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, [fol. 729] ultimately to determine as a matter of law what they include. *They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.* The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade." (Emphasis supplied.)

And in *Federal Trade Commission* v. *Raladam Co.*, supra, 1931, 283 U.S. 643, 648, 51 S.Ct. 587, 75 L.Ed. 1324:

"* * * It [the words 'unfair methods of competition'] belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans,* 96 U.S. 97, 104. The question is one for the final determination of the courts and not of the Commission. *Federal Trade Comm.* v. *Gratz,* 253 U.S. 421, 427; *Federal Trade Comm.* v. *Beech-Nut Co., supra,* p. 453."

Our question here is whether Brown's program could possibly be classified as an "unfair method of competition". What Brown did in the operation of its Brown franchise stores program it had been doing for at least thirty years prior to the institution of this proceeding. Similar programs are operated by its competitors, such as International Shoe Company's Merchants Service Plan and General Shoe Company's General Shoes Friendly Franchise Store Plan.[4] No court has gone so far as to

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[4] As of 1961 International Shoe had some 1,400 independent retailers under its Merchants Service Plan while some 317 shoe retailers were members of General Shoe's Friendly Franchise Store Plan.

hold like programs or methods of doing business unlawful [fol. 730] under § 5 of the Federal Trade Commission Act and such programs or sales methods have never heretofore been "* * * regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against the public policy because of their dangerous tendency unduly to hinder competition or create monopoly." 253 U.S. at page 427.

The Commission would liken Brown's program to "tying arrangements", relying on *Northern Pacific Railway Co.* v. *United States,* 1958, 356 U.S. 1, 78 S.Ct. 514, 2 L. Ed. 2d 545, and other cases. *Northern Pacific* is factually distinguishable. The railway company there possessed a monopoly of some 40,000,000 acres of land along the route of its railroad line from Lake Superior to Puget Sound. The company tied the sale or lease of its land to the use of its hauling services by inserting "preferential routing" clauses in its contracts for sale and leases which compelled the buyer or lessee to ship over Northern Pacific's lines all commodities produced or manufactured on the land provided its rates were equal to those of competing carriers. The railway used its great economic power provided by the land to enforce the use of its transportation facilities.

Analyzing what Brown Shoe Company did in the instant case insofar as its Brown franchise stores program is concerned, we find:

1. It made agreements, some in writing but more orally, in which it agreed to furnish certain services to those of its customers who would "concentrate" their business on shoes manufactured by Brown.

2. The services were free of charge with the exception of the fact that Brown's four seasonal window display [fol. 731] props for two windows cost $500 to $600 per year and were available as well to other independent retail shoe store customers of Brown.

3. Brown did not have a monopoly on the services which constituted the tying product nor did it have a monopoly on the tied product—shoes.

4. Brown's competitors also furnished services in connection with the sale of their shoes.

5. Retailers were free to abandon the arrangement at any time they saw it to their advantage so to do.

6. Most of the services were available to customers who did not join in the Brown franchise program.

The Commission draws a parallel between the effect of the sale or lease by the railroad of its land in *Northern Pacific* with Brown's giving its services to the participants of Brown's franchise stores program, thus forcing them to buy Brown's shoes.[5]

We find no comparability between Brown's situation and that which existed in *Northern Pacific.* The Supreme Court, in holding the tying arrangement in *Northern Pacific* as being unlawful *per se,* stated at page 5 of 356 U.S.:

> "* * * Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 210; division of markets, *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U.S. 457; and tying arrangements, *International Salt Co.* v. *United States,* 332 U.S. 392.
>
> [fol. 732] "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying

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[5] The Commission states in its brief: "In this, it resembles the converse of the situation presented in *Northern Pacific,* where the railroad's freight *services* were 'tied' to the use of its *products* (the valuable lands involved). 356 U.S. 1 (1958)."

requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 606. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. *International Salt Co.* v. *United States,* 332 U.S. 392. Cf. *United States* v. *Paramount Pictures,* 334 U.S. 131, 156-159; *United States v. Griffith,* 334 U.S. 100. *Of course where the seller has no control or dominance over the tying product* [*franchise services*] *so that it does not represent an effectual weapon to pressure buyers into taking the tied item* [*shoes*] *any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.* As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." (Emphasis supplied.)

[fol. 733] Holding at page 7 of 356 U.S. that

"* * * the undisputed facts established beyond any genuine question that the defendant possessed substantial economic power by virtue of its extensive landholdings which it used as leverage to induce large numbers of purchasers and lessees to give it preference, to the exclusion of its competitors, in carrying goods or produce from the land transferred to them. Nor can there by any real doubt that a 'not insubstantial' amount of interstate commerce was and is affected by these restrictive provisions."

the court goes on to say at page 11 of 356 U.S.:

"* * * the vice of tying arrangements lies in the use of economic power in one market to restrict com-

petition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not."

While it is clear that a "not insubstantial" amount of interstate commerce is involved here, that fact alone does not make petitioner's program an "unfair" method of competition nor may the selling activities of petitioner be described as "deceptive acts or practices". In *Brown* there was no "sale" of the *typing* product (franchise services); there is no evidence that Brown's "power or leverage" in the tying product was such as to force the purchase of the "tied products" (shoes). This case presents a situation where the seller, Brown, has no control or dominance over the tying product, services; consequently, the Brown franchise program is not an "effectual weapon" to pressure buyers into taking the tied item, shoes.

If the free services which Brown Shoe Company gives its customers who buy its shoes under its Brown franchise program can be found to be unlawful under § 5 of the Act, then the next logical step would be to hold unlawful an [fol. 734] agreement by a manufacturer or distributor to advertise its products in fixed areas if retailers therein would agree to stock and to sell them.

We likewise find no comparability between the facts with which we are here concerned and *United States* v. *Loew's Inc.*, 1962, 371 U.S. 38, wherein the Supreme Court adopts the trial court's apt example of "* * * forcing a television station which wants 'Gone With The Wind' to take 'Getting Gertie's Garter' as well as taking undue advantage of the fact that to television as well as motion picture viewers there is but one 'Gone With The Wind.' " There is more than one source from which the Brown franchise dealers can obtain the services complained about. Brown had no monopoly on services performed under the franchise program. Other manufacturers can and do render like services.

Nor do we find *United States* v. *Jerrold Electronics, Inc.*, E.D.Pa., 1960, 187 F.Supp. 545, affirmed by the Supreme Court on the basis of *Northern Pacific, International Salt*, etc., at 365 U.S. 567, comparable to the facts with which we

are here concerned. In *Jerrold* the trial court said at page 555 of 187 F.Supp.:

> "* * * Jerrold's highly specialized head end equipment was the only equipment available which was designed to meet all of the varying problems arising at the antenna site. It was thus in great demand by system operators. This placed Jerrold in a strategic position and gave it the leverage necessary to persuade customers to agree to its service contracts. This leverage constitutes 'economic power' sufficient to invoke the doctrine of *per se* unreasonableness."

There is no parallel between the facts present in *Jerrold* and those presented here. Brown's franchise program [fol. 735] was not the only program available to retailers. It did not give Brown the economic leverage to force the sale of its shoes. The tying product in *Jerrold* was highly specialized equipment which was in great demand. There is nothing specialized or unique about the services offered by Brown.

The Commission alternatively relies on *Brown Shoe Co., Inc.* v. *United States*, supra, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510, as persuading it "* * * that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act, as amended, have been met." We cannot agree. That case tested the illegality of Brown's acquisition of Kinney through a merger of the corporations and found that the vertical arrangements were illegal under §§ 3 and 7 of the Clayton Act. We find it utterly unpersuasive here. Brown has not "acquired" the retail outlets of those who join its program. The latter are free to leave it at any time. The only similarity between this case and the previous *Brown Shoe Co.* decision, supra, is the fact that the same corporation is involved in both disputes.

This case can be likened to *Timken Roller Bearing Co.* v. *F. T. C.*, 6 Cir., 1962, 299 F.2d 839, certiorari denied, 371 U.S. 861, 9 L.Ed.2d 99. There Timken was found by the Federal Trade Commission to be in violation of § 3 of the Clayton Act, 15 U.S.C.A. § 14, by following a consistent policy of "exclusive dealing". The court, in setting aside

the Commission's order and findings, said beginning at page 840:

"In support of the accusations contained in the Complaint, the Commission introduced in evidence numerous documents purporting to prove Timkin's [fol. 736] consistent policy of exclusive dealing. The majority of these documents consisted of salesmen's reports to the Timken home office, recommending the taking on of a new account or the canceling of an old one. In our view, the Commission's whole case rests upon the fact that in these reports, the salesmen either recommended Timken's taking on a new account because it would be 'loyal' to that company, or suggested that an old account be cancelled because the dealer was stocking the products of a Timken competitor.

* * * * * * *

"* * * Nor can the documents alone be substantial evidence of such a policy, inasmuch as, even if these reports show that Timken cancelled dealers' accounts because they were dealing in competitive bearings, this alone is not illegal. Perhaps the rule has best been stated for our purposes in the following language: 'The anti-trust laws do not prohibit a manufacturer or distributor from selecting dealers who will devote their time and energies to selling the former's products and a manufacturer is not compelled to retain dealers having divided loyalties adverse to the interests of the said manufacturer or distributor.' *McElhenny Co., Inc.* v. *Western Auto Supply Co.,* 167 F.Supp. 949, at page 954, affirmed 269 F.2d 332 (C.A.4).

"A seller has the right to select his own customers. This right is protected by the Clayton Act, itself. 15 U.S.C.A., § 13. The right has been recognized by the authorities, even where it was not expressly provided for by the statute. *United States* v. *Colgate & Company,* 250 U.S. 300, S.Ct. 465, 63 L.Ed. 992; *Times-Picayune Publishing Company* v. *United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277; *Naifeh* v. *Ronson Art Metal Works,* 218 F.2d 202 (C.A. 10). To uphold the order entered by the Commission in this case would be, in effect, to destroy this right."

By passage of the Federal Trade Commission Act, particularly § 5 thereof, we do not believe that Congress meant [fol. 737] to prohibit or limit sales programs such as Brown Shoe engaged in in this case. No monopoly of either services or shoes could be established. The custom of giving free service to those who will buy their shoes is widespread, and we cannot agree with the Commission that it is an unfair method of competition in commerce. The more and better service that Brown gave to its customers, the more it strengthened their "loyalty" to Brown Shoe. The fact that Brown franchise dealers were successful, having an average return of 16% against an average return of other independent shoe dealers in America of 11.8% certainly does not operate against the legality of the program. We hold that the Brown franchise stores program was not an unlawful tying arrangement and that there was a complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act.

With reference to Count 2, it is the contention of the Commission that there was substantial evidence in the record to support its finding that the petitioner engaged in unlawful resale price maintenance. Evidence on this count involves only 2 of approximately 6,000 independent shoe retail customers of Brown—Fraver's Shoe Store of Chambersburg, Pennsylvania, and Pomeroy's Department Store in Harrisburg, Pennsylvania. The Fraver incident is very much disputed and is based upon an unauthorized letter never used. The Pomeroy incident is based entirely on disputed testimony, by far the greater weight of which favored petitioner's contention, not the findings and inference of the Commission. Even under this court's limited scope of review, *Universal Camera Corp.* v. *N. L. R. B.*, 1951, 340 U.S. 474, 488, 71 S.Ct. 456, L.Ed. 456, we are of the opinion that the findings and conclusions of the Commission and the order based upon them must be set [fol. 738] aside as not supported by substantial evidence on the record considered as a whole.

The order and opinion of the Commission are set aside and the Commission's complaint and each count thereof ordered dismissed.

[fol. 739] IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

No. 17336. September Term, 1964.

BROWN SHOE COMPANY, INC., Petitioner,

vs.

FEDERAL TRADE COMMISSION.

Petition to Review Order of Federal Trade Commission

JUDGMENT—December 8, 1964

This cause came on to be heard on the petition to review Order of the Federal Trade Commission, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged that the final Order and Opinion of the Federal Trade Commission of February 20, 1963, be, and is hereby set aside and the Complaint of the Commission and each of the Counts thereof, be, and is hereby, dismissed.

[fol. 740] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 741] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No.—

FEDERAL TRADE COMMISSION, Petitioner,

vs.

BROWN SHOE COMPANY, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 8, 1965

Upon Consideration of the application of counsel for petitioners,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including May 7, 1965.

Byron R. White, Associate Justice of the Supreme Court of the United States.

Dated this 8th day of March, 1965.

[fol. 742] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

No. 118

FEDERAL TRADE COMMISSION, Petitioner,

v.

BROWN SHOE COMPANY, INC.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.